IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

THURSDAY, THE 25TH JANUARY 2007 / 5TH MAGHA 1928

SA.No. 643 of 1994(B)

(AGAINST THE JUDGMENT IN O.S.105/1985 OF THE MUNSIFF'S COURT, CANNANORE AND DECREE IN A.S.144/93 OF THE SUBORDINATE JUDGE'S COURT, THALASSERY)

APPELLANT:

---

1. MANIYATAN ZACHARIARS, MATTOOL AMSOM DESOM, MATTOOL NORTH, KANNUR.

2. KARMAELI, MATTOOL AMSOM DESOM, MATTOOL NORTH, KANNUR.

BY ADV. SRI.R.K.MURALEEDHARAN

RESPONDENTS:

PATINHARE PURAYIL NABEESUMMA, MATTOOL AMSOM DESOM, KANNUR.

BY ADV. SRI.V.V.ASOKAN.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 25/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Thottathil B. Radhakrishnan, J.

==========

S.A.No.643 of 1994

==========

Dated this the 25th day of January, 2007.

JUDGMENT

This second appeal is by the defendants in a suit for injunction and recovery of possession.

2. The suit property consists of five items. Alleging that they were acquired by Bavu Valappil Mammad as a Kuzhikanam right from the land owner, namely the Palakodan tarwad, the plaintiff sued on the strength of purchase certificate shown to have been issued by the Land Tribunal in favour of Mammad in S.M.P.No.6324/76, the plaintiff being the wife of Mammad. Pending suit, the plaint was amended on the basis of Commissioner's report and plan which evidence that certain items in relation to which the decree of injunction was sought for, were essentially in the possession of the defendants. By such amendment, the plaintiff sought recovery of possession of plots A, E and F shown in the Commissioner's plan and injunction regarding the remaining items.

3. The defendants contended that Mammad had no right over the suit properties and they belonged to Palakodan Moideenkutty, who granted a lease to the first defendant in January, 1959. The first defendant held out a purchase certificate issued by the Land Tribunal as per order on S.M.P.No.6343/77 and further, that the right, title and interest of the land owner were also got assigned by the first defendant as per order on O.A.No.456/74. The trial court initially granted a decree of perpetual injunction restraining the defendants from trespassing into the plaint A schedule items 2 and 3. It also granted the plaintiff the relief of recovery of possession of B schedule items 2 and 3. The suit was dismissed in respect of the other items. Deciding the two first appeals, namely A.S.NO.68/88 and A.S.No.188/88, the first appellate court by order dated 18-12-1990 remitted the matter for reconsideration of the rights of parties as regards item No.2 in plaint B schedule property, holding that such right has to be referred for adjudication to the Land Tribunal under the Kerala Land

Reforms Act. The decree stood confirmed in so far as other matters are concerned.

4. Therefore, the scope of the remand was only as regards item No.2 in plaint B schedule property with a specific direction for considering the rival claims on the basis of a decision to be entered into by the Land Tribunal as regards the rival tenancy rights set up by both sides.

5. After such remit and consequential reference to the Land Tribunal, the parties endorsed before the Land Tribunal that they have no further oral evidence. The Land Tribunal thereafter considered the documentary evidence, as also the authorised officer's report and concluded that the plaintiff is in possession of the property but does not have any valid title deeds evidencing tenancy. It also held that the defendant had also no valid records to establish creation of tenancy in favour of them by the land owner. Incorporating the said findings, the trial court on 27-2-1993 held that the plaintiff has right over B

schedule item No.2 and it could be recovered on the strength of title.

6. Rejecting the first appeal of the defendants, the lower appellate court held that the finding of the Land Tribunal is sustainable and therefore, the decree of the trial court stands.

7. Among the different submissions made by the learned counsel for the appellants, the only one substantial question of law arising for decision is as follows:

> Whether the courts below were justified in holding that the plaintiff has title to be granted a decree for recovery of possession of B schedule item No.2 from the defendants, after the Land Tribunal had found that the plaintiff does not have valid title deeds evidencing tenancy?

8. The remand order passed by the first appellate court in A.S.No.68/88 and A.S.No.188/88 on 18-12-1990 is binding on the parties and that has become final, not having been challenged. After adverting to the materials then on record, the lower appellate court had noticed that on the basis of Ext.A2 purchase certificate, it could be seen that B schedule item No.2, namely Plot A in the Commissioner's plan, apparently belonged to the predecessor-in-interest of the plaintiff. However, it was also noticed that the issuance of purchase certificate to the first defendant as Exts.B3 and B2 order granting purchase certificate also stand. It was accordingly that the matter was remitted. The said order of remit was made after noticing that Ext.B2, on the basis of which the defendants claim, was not one issued with Palakodan Ayissa also as a party to those proceedings and that only Palakodan Moideenkutty was shown as respondent in Exts.B2 and B3 proceedings. In this situation, the learned counsel for the appellants urged that Palakodan Ayissa died on 2-8-1961 and therefore, the purchase certificate, Ext.A2, in favour of the plaintiff, could

not have been obtained.

9. Following the order of remit, the Land Tribunal was faced with the situation where neither among the parties led evidence. The scope of remand was essentially one by which there has to be a reconsideration of the question as to whether it is the plaintiff or the defendants who are entitled to get tenancy right under the Kerala Land Reforms Act as regards B schedule item No.2. It is the admitted case that neither of them had the title to the property. This is because both of them claimed to be tenants. The only dispute is as to whether the landlord was represented and still further, whether the tenancy right sustains. So much so, in so far as B schedule item No.2 is concerned, the first defendant is found to be in possession, while the plaintiff wanted the recovery of possession on the strength of title depending on the declaration of the Land Tribunal that he is a tenant entitled to fixity of tenure over the holding. But the Land Tribunal, by order dated 15-10-1992 in R.C.No.1 of 1991, rendered following the remand

by the first appellate court, came to the definite conclusion that the plaintiff does not have tenancy right and the defendants have not established the tenancy right. On such a finding, it was apparent that the parties would stand on the situation where the defendants are found to be in possession of B schedule item No.2, of which the plaintiff wants the recovery of possession and that the plaintiff has not established fixity of tenure so as to sustain a better claim of title. Hence, the courts below had acted contrary to law in granting a decree for recovery of possession on the strength of title. This is because, the plaintiff could not show a better title than the defendants in so far as B schedule item No.2 is concerned. The question of law framed has necessarily to be answered by holding that the plaintiff, not having proved a better title than the defendants and the Land Tribunal having not found that the plaintiff entitled to fixity of tenure, the courts below had acted contrary to law in ordering recovery of possession of B schedule item No.2 from the defendants. The defendants cannot be held to be merely the trespassers. It is not a case where the

plaintiff can be permitted to recover strength on the basis of prior possession. The suit is not based on any such contention.

In the result, this second appeal is allowed vacating the decree and judgments of the courts below to the extent it grants the plaintiff recovery of possession of B schedule item No.2 from the defendants. Having regard to the nature of the materials on record, the parties are directed to suffer their respective costs.

Thottathil B.Radhakrishnan,
Judge.

sl.

Thottathil B. Radhakrishnan, J.

==========

S.A.No.643 of 1994

==========

JUDGMENT

Dated:25-1-2007